PP

v.

MAT ZALI LAHMAN

HIGH COURT MALAYA, ALOR STAR
ZAMANI A RAHIM JC
[CRIMINAL APPEAL NO: 41-97-2007]
14 SEPTEMBER 2009

ROAD TRAFFIC: *Dangerous driving - Causing death by reckless or dangerous driving - Appeal against acquittal and discharge of accused - Whether elements of offence under s. 41(1) Road Transport Act 1987 satisfied - Identity of deceased, whether proven - Whether accused to be called upon to make his defence under s. 42 instead*

The accused was charged in the Magistrate's Court under s. 41(1) of the Road Transport Act 1987 ('Act') for driving a motor vehicle in a dangerous manner and thereby causing the death of a 14-month old child, one Mohd Faezuan Nordin. The Magistrate found that the accused did not drive his motorcar dangerously having regard to all the circumstances at the material time of collision including the nature, condition and size of the road (element 3 of the offence under s. 41(1) of the Act). At the close of the prosecution's case, the Magistrate dismissed the charge and acquitted and discharged the accused. This was the prosecution's appeal against that decision.

Held (allowing the appeal):

(1) On the facts and evidence of this case, the Magistrate had erred in finding that the accused did not drive his motorcar dangerously within element 3 of the offence under s. 41(1) of the Act which resulted in the accident in question. The Magistrate was, however, correct in holding that the prosecution had failed to prove the identity of the deceased, another important element of the offence under s. 41(1) of the Act. But just because the identity of a dead person involved in a road accident cannot be proved, it does not mean that an accused may get off scot-free. Section 42 of the Act does not require proof of death as a result of reckless or dangerous

A driving. In light of the above, the prosecution's appeal was allowed and the accused was called upon to make his defence under s. 42 of the Act. (paras 16, 17, 18, 19 & 20)

[Case remitted to Magistrate's Court for accused's defence to be called.]

B **Case(s) referred to:**
Gunasekaran Buchia v. PP [1995] 2 CLJ 397 HC ***(refd)***
Hussin Ismail v. PP [2000] 8 CLJ 210 HC ***(refd)***
Lim Chin Poh v. PP [1969] 1 LNS 92 ***(refd)***
PP v. Ong Kia Chan [2006] 4 CLJ 334 HC ***(refd)***
C *PP v. Zulkifli Omar [1998] 1 CLJ 1079 HC* ***(refd)***
Ramiah v. PP [1972] 1 LNS 120 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 158
Evidence Act 1950, ss. 134, 157
D Road Traffic Ordinance 1958, s. 34A
Road Transport Act 1987, ss. 41(1), (4), 42, 43

For the appellant - Allan Suman DPP
For the respondent - Prem Singh

E *Reported by Suresh Nathan*

JUDGMENT

F **Zamani A Rahim JC:**

The Charge

[1] The charge against the appellant (accused) was under s. 41(1) of the Road Transport Act 1987 (the Act) and the charge reads as follows:

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> Bahawa kamu pada 17/12/2002 jam lebih kurang 11.00 pagi di Jalan Sungai Perahu, Jeniang di dalam Daerah Kuala Muda, Kedah semasa memandu motorkar No: WFA 2278 di atas jalanraya
H tersebut kamu telah memandu dalam keadaan yang merbahaya dan menyebabkan kematian Mohd. Faezuan bin Nordin KP 000930140609. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 41(1) Akta Pengangkutan Jalan 1987 (Pindaan 1999 Akta A 1065) yang boleh dihukum di bawah seksyen dan Akta yang sama.

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Prosecution Case

[2] The prosecution case may be summarised as follows:

[3] On 17 December 2002, at about 10.30am, SP5 was driving his motorcar, WHR 9491 from the direction of Jeniang towards Sungat Petani. Together with him in the said motorcar were his wife, SP4, three children including 14-month old son, a cousin and a mother-in-law. The wife, SP4 was seated on the passenger front seat next to SP5. The 14-month old son, Mohd Faezuan bin Nordin was on her lap.

[4] Upon arrival at a bend at Jalan Sungai Perahu, Jeniang, a motorcar, WFA 2278 driven by the accused came from the opposite direction, at a distance of about 50 metres overtook a motorcar in front of him. In the course of overtaking, the accused had encroached into SP5's right of way. SP5 evaded to the left onto the grass road shoulder and at the same time, SP5 gave a warning by flashing high light. The accident was not to be avoided. The accused's motorcar veered of his path and collided on with SP5's motorcar. As a result of the collision, SP5's 14-month old son, Mohd. Faezan bin Nordin had passed away.

[5] A police report *vide* Kuala Muda Report No: 6602/02 was lodged by SP5.

Law

[6] The offence of s. 41(1) of the Act provides.

> Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and side of the road, and the amount of traffic which might be expected to be on the road) is dangerous to the public, cause the death of any person shall be guilty of an offence and shall on conviction be punished with imprisonment for a term of not less than two years and not more than ten years and to a fine of not less than five thousand ringgit and not more than twenty thousand ringgit.

[7] The predecessor of s. 41(1) of the Act was s. 34A of the Road Traffic Ordinance. In considering s. 34A in *Ramiah v. PP* [1972] 1 LNS 120, Raja Azlan Shah (as he then was) said:

A It is not the law under section 34A of the Road Traffic Ordinance that merely because an accident had happened and a person had been killed, danger had in that sense arisen and therefore it must follow, as the night, the day, that the appellant was driving in a manner dangerous to the public. In a case under section 34A, two
B things must be established. First, there must be a situation created by the accused which, viewed objectively, is dangerous. Dangerous driving is not defined in the Road Traffic Ordinance and it is up to the court to come to a decision on the evidence.

[8] In another case *PP v. Ong Kia Chan* [2006] 4 CLJ 334 it
C was held as follows:

In a case of dangerous driving, the prosecution must establish that:

(1) a situation created by the accused is dangerous eg, turning
D right into the side road without stopping to give away to through traffic; and

(2) when creating a situation the accused was at fault. Fault involves a failure; a failing below the care and skill of a competent and experienced driver in relation to the manner
E of driving and the relevant circumstances ((per Raja Azlan Shah in *Ramiah v. PP*) at pp 258-259.

[9] In my view there are three distinct offences under this section because the use of the word "or" which is disjunctive.
F They are:

1) by driving a motor vehicle recklessly;

2) by driving a motor vehicle at a speed;

G 3) by driving a motor vehicle in a manner which having regard to all circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public;

H 4) either one of the abovementioned driving has cause the **death** of a person.

[10] In the current case, the accused was charged with element three above stated, though the said element was not cited in full in the charge. The accused was not misled by it. The prosecution
I is required to prove firstly, the accused was driving in a manner having regard to all the circumstances at the material time of

accident including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road, was dangerous to the public. Secondly, such driving by the accused had caused the death of Mohd Faezuan bin Nordin.

[11] The central facts here are these. The accused was coming from the opposite direction, overtook a motorcar in front of him. In the process of overtaking, at a speed reckoned to be excessive, encroached into SP5's right of way and rammed into SP5's motorcar head on. The force of the collision had pushed SP5's motorcar off the road and landed beyond its grass road shoulder facing Sungai Petani. Whilst the accused motorcar rested across SP5's side of the road with its head facing SP5's motorcar.

[12] The place of collision was at a slight right hand bend. There were scrubs and bushes on the right side of the road facing Jeniang. There was a double white line on the centre of the road. The road was narrow.

[13] The sketch plan showed there were two brake marks, H1 to H2 and H3 to H4. The brake mark, H1 to H2 was approximately 15.70 metres. The beginning of the brake mark, HI was on the accused side of the road, closed to the double white lines about 0.10 metres. This brake mark cut across the centre double white line and ended at the rear off side of the accused motorcar. Similarly, the brake mark, H3 to H4 ended at the front off side of the accused motorcar (no measurement was taken on the length of this brake mark, but appeared to be shorter than the brake mark, H1 to H2), There was also glass splinters marked I in the sketch plan which showed the point of impact was on SP5's side of the road.

[14] All the above findings are indicative that the accused was speeding. Viewed objectively he had created a dangerous situation by overtaking the motorcar in front of him, which proceeded in the same direction and the accused certainly was at fault. In the case of *Lim Chin Poh v. PP* [1969] 1 LNS 92, Choor Singh J said:

> In my opinion the expression driving in a manner which is dangerous to the public indicates some dangerous act or manoeuvre on the part of the driver of a vehicle, eg, overtaking a vehicle on the wrong side of it or **overtaking in the face of on coming traffic** or overtaking when unable to see oncoming

A traffic or crossing a junction against traffic light and so on. There must be some positive act on the part of the driver which is dangerous having regard to all circumstances.

[15] The learned Magistrate had made a finding that the B prosecution had failed to prove that the accused was driving dangerously having regard to all the circumstances of the material time of collision including the nature, condition and size of the road, contrary to the oral testimonies of SP5 and SP4, the mute evidence of the photographs, P3A-K, the sketch plan, P5 and C P5K and the Puspakom reports, P7 and P8 respectively. The learned Magistrate appeared to have doubted the presence of the motorcar which was overtaken by the accused just before the collision. Despite no finding that SP5 and SP4 were unreliable and incredible witnesses, the learned Magistrate appeared to have D insisted that the prosecution should have called the four remaining passengers of SP5's motorcar to testify about the accused overtaking the motorcar in front of him before the collision. The learned Magistrate did not seem to judicially appreciate that SP5's testimony in this respect was consistent with his police report, P4: E see s. 157 of Evidence Act. Another provision which appeared to have escaped the learned Magistrate attention is s. 134 of Evidence Act which says "No particular number of witness shall in any case be required for the proof of any fact". According to S. Augustine Paul (currently our FCJ) in his book *Evidence Practice and Procedure* – This section enshrines the well recognised maxim F that "Evidence has to be weighed and not counted".

[16] Having said all that, I do not agree with the learned Magistrate's finding that the accused did not drive his motorcar, WFA 2278 dangerously within element three of the offence under G s. 41(1) of the Act which resulted in the accident on that fateful day. She dismissed the charge at the close of the prosecution, acquitted and discharged accused.

[17] However, I am in agreement with the learned Magistrate H that the prosecution had failed to prove the identity of the deceased, another important element of an offence under s. 41(1) of the Act, that is, element four above stated. In the case of *Hussin bin Ismail v. PP* [2000] 8 CLJ 210, it was said:

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> Although the husband of the deceased (SP3), the investigating officer (SP8) and the medical officer who examined the deceased were called to testify on behalf of the prosecution, the prosecuting officer did not ask these witness any question to establish the identity of the deceased. Therefore, the prosecution had not proven the identity of the deceased which was an essential and important ingredient of the charge ...

[18] See also *Gunasekaran Buchia v. PP* [1995] 2 CLJ 397.

[19] Though the identity of the deceased was not established, for that reason the legislature has, in all its wisdom, made express provision under s. 41(4) that "the court may upon the trial of a person for an offence under this section (ie, s. 41(1) convict such person for an offence under s. 42 or s. 43: see *PP v. Zulkifli Omar* [1998] 1 CLJ 1079 at p. 1085. Just because an identity of the dead person involved in a road accident cannot be proved, it does mean the accused may get scot-free. Section 42 does not require proof of death as a result of a reckless or dangerous driving.

[20] On the evidence, if the learned Magistrate had properly addressed her mind to the law and the facts in this case, she would not have made the decision she did. In the light of the above, in exercising my discretion under s. 158 of the Criminal Procedure Code, I, therefore, allowed the prosecution's appeal. The accused is called upon to make his defence under s. 42 of the Act. The case is hereby remitted back to the Magistrate Court Gurun for the accused defence to be called.